

January 1993

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James E. Conwell

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#### Recommended Citation

James E. Conwell, *Limitations on Legislative Immunity: A New Era for Montana's Sovereign Immunity Doctrine*, 54 Mont. L. Rev. (1993).

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# COMMENT

## LIMITATIONS ON LEGISLATIVE IMMUNITY: A NEW ERA FOR MONTANA'S SOVEREIGN IMMUNITY DOCTRINE

James E. Conwell

### I. INTRODUCTION

Recent Montana Supreme Court decisions correctly reflect the Montana legislature's intent to limit application of sovereign immunity to the purely legislative acts of exclusively legislative entities.<sup>1</sup> The supreme court, relying on recent amendments to the sovereign immunity statutes, now seeks to fashion a new course for the sovereign immunity doctrine in Montana.<sup>2</sup> The court's new direction on the issue could not have come too soon. The supreme court, in a line of cases decided before section 2-9-111 of the Montana Code's amendment, seemingly removed any limitation upon the activities of governmental entities and, in effect, granted them virtual immunity.<sup>3</sup> Perhaps most illustrative of this unfortunate trend was the case of *S.M. v. R.B.*<sup>4</sup>

S.M. was a four-year-old developmentally disabled girl enrolled in the Missoula School District's special education program. While in school, S.M. suffered severe injuries when an educational aide sexually assaulted her. S.M. and her family sued the school district and the educational aide.<sup>5</sup> On May 23, 1991, the Montana Supreme Court held in *S.M.* that the school district fell under the sovereign immunity umbrella of section 2-9-111.<sup>6</sup> The supreme

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1. MONT. CODE ANN. § 2-9-111 (1991).

2. See, e.g., *Dagel v. City of Great Falls*, 250 Mont. 224, 819 P.2d 186 (1991).

3. See generally John A. Kutzman, Comment, *The King's Resurrection: Sovereign Immunity Returns to Montana*, 51 MONT. L. REV. 529 (1990).

4. 248 Mont. 322, 811 P.2d 1295 (1991).

5. *Id.* at 324, 811 P.2d at 1297.

6. *Id.* at 327, 811 P.2d at 1299 (citing MONT. CODE ANN. § 2-9-111 (1989) (originally enacted 1977) (amended 1991)). See *infra* note 41 for the 1977 statute's text.

court further held, however, that by purchasing liability insurance, the school district "waive[d] its immunity to the extent of the coverage granted by the . . . insurance policies."<sup>7</sup>

The court reached a similar result in a case involving a Lake County elementary school student who assisted a teacher during track practice by marking the spots where shot puts landed.<sup>8</sup> As the student marked a spot, a shot put thrown by the supervising teacher struck and injured the student.<sup>9</sup> The student sued the school district and the teacher. On the same day the *S.M.* decision was handed down, the Montana Supreme Court held the school district and teacher immune from suit under section 2-9-111 in *Hedges v. Swan Lake and Salmon Prairie School District No. 73*.<sup>10</sup> As in *S.M.*, the court in *Hedges* ruled that the school district waived the immunity provided by section 2-9-111 to the extent of the coverage of the district's insurance policies.<sup>11</sup>

These cases help illustrate the outer boundary of sovereign immunity, extended by the supreme court to a great degree in the earlier case of *State ex rel. Eccleston v. Montana Third Judicial District Court*.<sup>12</sup> In *Eccleston*, the supreme court granted immunity to high school gymnasium custodians when their failure to remove ice and snow from a stairway caused a woman to fall and suffer injuries.<sup>13</sup> The decisions in these cases, as well as a group of decisions rendered prior to them, called attention to the need for statutory change.<sup>14</sup>

The 1991 Montana Legislature, in response to the supreme court's interpretations, amended section 2-9-111<sup>15</sup> by narrowly defining the acts for which governmental entities are immune and by specifying which entities enjoy immunity. Additionally, the legislature changed the statute so that governmental entities do not waive their immunity simply by purchasing liability insurance.<sup>16</sup> Ironically, the amended statute became effective just one day after the Montana Supreme Court decided *S.M.* and *Hedges*.<sup>17</sup> *S.M.* and *Hedges*, which exemplify the controversy surrounding the archaic

7. *S.M.*, 248 Mont. at 328, 811 P.2d at 1299.

8. *Hedges v. Swan Lake & Salmon Prairie Sch. Dist. No. 73*, 248 Mont. 365, 366, 812 P.2d 334, 334 (1991).

9. *Id.* at 366, 812 P.2d at 334.

10. *Id.* at 368, 812 P.2d at 335.

11. *Id.* at 368, 812 P.2d at 336.

12. 240 Mont. 44, 783 P.2d 363 (1989).

13. *Id.* at 54, 783 P.2d at 369.

14. See Kutzman, *supra* note 3.

15. MONT. CODE ANN. § 2-9-111 (1991).

16. MONT. CODE ANN. § 2-9-111(4) (1991).

17. 1991 Mont. Laws 818, 821.

sovereign immunity doctrine, were the last cases decided before section 2-9-111's amendment. The supreme court's recent interpretations<sup>18</sup> of the amended statute are building a new body of case law granting relief to injured parties who seek judicial redress in cases against the government.

This Comment provides a brief history of the sovereign immunity doctrine and examines the Montana Supreme Court's past and more recent treatment of the doctrine. A discussion of the circumstances surrounding the legislature's amendment of Montana's legislative immunity statute in 1991 follows the historical review. This Comment next examines the significant changes made to the sovereign immunity statute and explores the supreme court's post-amendment collection of cases applying the new statute. Finally, this Comment asserts that recent supreme court decisions interpreting section 2-9-111 correctly reflect the legislative intent behind the amended statute.

## II. GENERAL HISTORY OF SOVEREIGN IMMUNITY

The sovereign immunity doctrine developed during feudal times when the lord of a manor could not be sued in his own courts.<sup>19</sup> The king, as the highest of all lords, enjoyed the same protection.<sup>20</sup> The doctrine appeared succinctly in Blackstone's maxim: "The king can do no wrong."<sup>21</sup>

Sovereign immunity was brought to the United States as part of English common law.<sup>22</sup> The doctrine evolved into state governmental immunity, which "bars holding the government or its political subdivisions liable for the torts of its officers or agents unless such immunity is expressly waived by statute or by necessary inference from legislative enactment."<sup>23</sup> As the doctrine took root in the United States, courts and commentators worked to understand the doctrine and to justify its presence in a democratic nation.

18. See *Knight v. City of Missoula*, 252 Mont. 232, 827 P.2d 1270 (1992); *Quirin v. Weinberg*, 252 Mont. 386, 830 P.2d 537 (1992); *Hedges v. Swan Lake & Salmon Prairie Sch. Dist. No. 73*, 253 Mont. 188, 832 P.2d 775 (1992); *Koch v. Billings Sch. Dist. No. 2*, 253 Mont. 261, 833 P.2d 181 (1992); *Dagel v. City of Great Falls*, 250 Mont. 224, 819 P.2d 186 (1991).

19. See *Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457 (Cal. 1961) (discussing the doctrine's history and development).

20. *Id.* at 458 n.1.

21. 1 WILLIAM BLACKSTONE, COMMENTARIES \*246.

22. 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.01, at 436 (1958). See also 18 EUGENE MCQUILLIN AND STEPHEN M. FLANAGAN, THE LAW OF MUNICIPAL CORPORATIONS § 53.02, at 133 (3d. ed. rev. 1984).

23. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). The terms "sovereign immunity" and "governmental immunity" are used synonymously in this Comment.

Often, their arguments floundered and lacked cogent explanation. For example, United States Supreme Court Justice Samuel Miller wrote that while sovereign immunity has been "repeatedly asserted here, the principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."<sup>24</sup>

Over the years, courts and commentators have attempted to justify the sovereign immunity doctrine. Some commentators have argued that involving the government as a defendant in civil litigation disrupts its ability to govern.<sup>25</sup> Others argue that control over governmental property and instrumentalities diminishes if the government has to face law suits.<sup>26</sup> Additionally, some commentators fear that settlements, judgments and insurance premium payments will create a potentially crippling tap upon government funds.<sup>27</sup> The idea also exists that because governments sometimes perform unique services not performed by members of the private sector, they should not have the same level of liability as private enterprises or individuals.<sup>28</sup> Finally, some commentators believe taxpayers are unwilling to use public funds to compensate private citizens.<sup>29</sup>

Despite these arguments courts in recent times have chipped away at the doctrine by creating exceptions designed to reduce the potentially severe results of governmental negligence.<sup>30</sup> Nevertheless, the doctrine remains controversial; courts and commentators continue to criticize governmental immunity as obsolete and un-

24. *United States v. Lee*, 106 U.S. 196, 207 (1882).

25. Joseph D. Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946).

26. *Id.*

27. Barry L. Hjort, Comment, *The Passing of Sovereign Immunity in Montana: The King Is Dead!*, 34 MONT. L. REV. 283, 287 (1973). The article's author concedes that the depletion of funds argument is unpersuasive when applied to the federal government because of the government's vast resources. However, the argument may still legitimately apply to state and local governments when one considers the potential financial strain incurred when paying insurance premiums or settling suits. *Id.*

28. See *J & B Dev. Co. v. King County*, 669 P.2d 468, 473 (Wash. 1983) (using the granting of building permits as an example).

29. See *Muskopf*, 359 P.2d at 459.

30. See generally Hjort, *supra* note 27 for a thorough discussion of the variations of sovereign immunity. Hjort describes sovereign immunity as a "doctrine of subtle gradations" that is "not normally applied with mechanical rigidity in those jurisdictions where it prospers, nor has it entirely disappeared from those states where it has been abrogated." *Id.* at 287 n.35. See also Kutzman, *supra* note 3, at 532-33, for a discussion of the distinction some courts make between "governmental" and "proprietary" functions. "A 'governmental function' was one that governments, rather than private enterprises, usually exercised; a 'proprietary function,' on the other hand, was one that a private enterprise might perform. Local governments could not claim sovereign immunity for lawsuits arising from their 'proprietary functions,' because those activities did not involve the exercise of sovereign power." *Id.* (citations omitted).

just. Then-Justice Traynor of the California Supreme Court wrote in 1961:

After a re-evaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust.

. . . .

The rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. It has been judicially abolished in other jurisdictions. None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact, it does not exist. It has become riddled with exceptions, both legislative and judicial, and the exceptions operate so illogically as to cause serious inequality.<sup>31</sup>

Variations of Justice Traynor's view of sovereign immunity spread throughout the country during the next several years. While most states now limit sovereign immunity's scope, vestiges of the doctrine remain in some form in many jurisdictions,<sup>32</sup> often through statutory enactments specifying which governmental entities may not be sued. Additionally, many states which accept liability in some instances, place dollar limits on the amount recoverable from those entities still subject to suit.<sup>33</sup>

### III. SOVEREIGN IMMUNITY IN MONTANA

#### A. *The Past*

Montana, while still a territory, first recognized sovereign immunity in 1868 when Justice Hiram Knowles wrote:

Montana Territory is a government created, it is true, by a law of Congress. Yet that law gives it very extensive powers. The reason of the law, which declares that no government can be sued without its consent, applies to this territorial government as well as to

31. *Muskopf*, 359 P.2d at 458, 460 (citations omitted).

32. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984) [hereinafter KEETON ET AL.] (dividing the states into three groups depending upon how much immunity each state retains). See also McQUILLIN & FLANAGAN, *supra* note 22, at 132 (contending a majority of states hold a municipality liable for its negligence, absent a statutory grant of immunity).

33. KEETON ET AL., *supra* note 32, at 1044 n.29, 1045 n.45. See also MONT. CODE ANN. § 2-9-108 (1986) (terminates June 30, 1993). Montana places "caps" on recovery for acts or omissions of an officer, agent, or employee of governmental entities of \$750,000 for each claim and \$1.5 million for each occurrence. *Id.*

any other government. . . . [N]o citizen of this territory can sue it.<sup>34</sup>

In subsequent years, the Montana Supreme Court wrestled with the task of applying the sovereign immunity doctrine. The court recognized the doctrine's often harsh result of leaving plaintiffs uncompensated for wrongs committed by the government. Consequently, the court created exceptions to the doctrine and began classifying cases using the governmental-proprietary distinction<sup>35</sup> and a discretionary-ministerial distinction<sup>36</sup> in cases involving public officers. The exceptions complicated the sovereign immunity issue and created a "plethora of hair-splitting distinctions."<sup>37</sup> Despite the exceptions, sovereign immunity survived as the rule in Montana until 1972.<sup>38</sup>

The 1972 Montana Constitution abolished sovereign immunity in Article II, Section 18.<sup>39</sup> The abolition was short-lived, however, because in 1975 Article II, Section 18 was amended, giving the Montana Legislature the power to reestablish immunity by a two-thirds vote in each house.<sup>40</sup> Two years later the legislature granted immunity to governmental entities for acts or omissions of its legislative body by enacting section 2-9-111 of the Montana Code.<sup>41</sup>

34. *Langford v. King*, 1 Mont. 33, 38 (1868). See also *Fisk v. Cuthbert*, 2 Mont. 593 (1887); *Hjort*, *supra* note 27, at 289; *Kutzman*, *supra* note 3, at 532.

35. *Coldwater v. State Highway Comm'n*, 118 Mont. 65, 72-74, 162 P.2d 772, 775-76 (1945). See *Kutzman*, *supra* note 3, at 532-33 (distinguishing governmental functions from proprietary functions).

36. See *Hjort*, *supra* note 27, at 290-91 n.59. Discretionary acts, which "require[] exercise in judgment and choice and involve[] what is just and proper under the circumstances," fall under the immunity doctrine. BLACK'S LAW DICTIONARY 467 (6th ed. 1990). Ministerial acts, which "involve[] obedience to instructions, but demand[] no special discretion, judgment, or skill," are not immune from liability. BLACK'S LAW DICTIONARY 996 (6th ed. 1990).

37. *Hjort*, *supra* note 27, at 291 (providing a sampling of cases to demonstrate the "artificial distinctions and arbitrary classifications that pervade the law of sovereign immunity.").

38. *Kutzman*, *supra* note 3, at 534.

39. *Kutzman*, *supra* note 3, at 534. "Transcripts of the constitutional convention clearly indicate that the delegates wanted to ensure full legal redress for every citizen regardless of the private or public nature of the defendant." *Id.*

40. The amended Article II, Section 18 of the Montana Constitution provides: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a  $\frac{3}{4}$  vote of each house of the legislature." MONT. CONST. art. II, § 18 (amended 1975).

41. In 1977, section 2-9-111 read:

(1) As used in this section:

(a) the term "governmental entity" includes the state, counties, municipalities, and school districts;

(b) the term "legislative body" includes the legislature vested with legislative power by Article V of The Constitution of the State of Montana and any local

The legislature justified reviving sovereign immunity by arguing that rising insurance costs, the government's vulnerability to tort actions, and the likely increased costs to taxpayers to fund insurance comprised unacceptable consequences of allowing citizens to sue the government.<sup>42</sup>

### B. A Recent Court "Gone off the Rails"

The Montana Supreme Court, in a line of cases attempting to discern the legislative intent behind section 2-9-111, began interpreting the scope of immunity provided by the statute. The task proved difficult for the court as it painstakingly sought to mold a framework for the sovereign immunity doctrine in Montana.<sup>43</sup> Factual and legal subtleties arose in the court's decisions that clouded analyses and precluded the development of stable precedent. The court received criticism for these decisions for granting immunity too readily to governmental entities and individuals believed to be beyond the sovereign immunity statute's scope.<sup>44</sup> Also, the cases carried strong dissenting opinions, demonstrating the controversial nature of this increasingly volatile issue.

Nevertheless, the majority seemed undaunted by the dissenters and critics. In rapid-fire succession, the court extended sovereign immunity to boards of county commissioners<sup>45</sup> and school dis-

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governmental entity given legislative powers by statute, including school boards.

(2) A governmental entity is immune from suit for an act or omission of its legislative body or a member, officer, or agent thereof.

(3) A member, officer, or agent of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with the introduction or consideration of legislation or action by the legislative body.

(4) The immunity provided for in this section does not extend to any tort committed by the use of a motor vehicle, aircraft, or other means of transportation.

MONT. CODE ANN. § 2-9-111 (1977).

42. Kutzman, *supra* note 3, at 536.

43. The difficulty most likely arose because of the ambiguous historical foundations upon which the sovereign immunity doctrine was based in this country, as well as the confusing language of Montana's statute. As the majority stated in one opinion, "we are not asserting in this opinion that the statute is unequivocally clear at first glance. Indeed, several interpretations of § 2-9-111, MCA, have been argued in the line of cases that have come before us since the statute's adoption." *State ex rel. Eccleston v. Third Judicial Dist. Court*, 240 Mont. 44, 54, 785 P.2d 363, 369 (1989).

44. Kutzman, *supra* note 3, at 529-30. Kutzman provides an excellent examination of some of the more significant cases leading up to the amendment of section 2-9-111, as well as an insightful analysis of where the court faltered in the decisions. "By focusing on the decision maker rather than the decision itself, the court laid the precedential foundation for its subsequent erroneous decisions extending legislative immunity to purely administrative acts." Kutzman, *supra* note 3, at 540.

45. *Bieber v. Broadwater County*, 232 Mont. 487, 759 P.2d 145 (1988). The Montana Supreme Court granted immunity to county commissioners who fired a member of the county road crew. The court determined that a governmental entity's "legislative" acts, pro-



tricts<sup>46</sup> for their administrative acts<sup>47</sup> of firing employees.

The supreme court, in perhaps Montana's most untenable decision on sovereign immunity, extended the immunity granted to school districts to such an extreme point that one of the case's two dissenting justices called it "ludicrous and unbelievable."<sup>48</sup> In *Eccleston*, a woman was injured after falling down a school gymnasium stairway.<sup>49</sup> She sued the school district, several of the school district's administrators, and two of the district's custodians for failing to properly light and remove snow and ice from the stairway.<sup>50</sup> The supreme court issued a writ of supervisory control to clarify whether section 2-9-111 provided immunity to the school district and the school district employees for acts committed during the course of the employees' jobs.<sup>51</sup>

The supreme court ruled that the school district, the adminis-

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tected by immunity under the 1987 version of section 2-9-111, extended to the entity's "day-to-day 'administrative' responsibilities," including the hiring and firing of county employees. *Id.* at 489, 759 P.2d at 146. See also *Burgess v. Lewis and Clark City-County Board of Health*, 244 Mont. 275, 796 P.2d 1079 (1990). The supreme court held, in a wrongful discharge action, that the Board of Health was acting as an agent of the County Commissioners and was therefore immune under section 2-9-111 when it fired an employee. *Id.* at 277, 796 P.2d at 1081. See also *Miller v. Fallon County*, 240 Mont. 241, 248, 783 P.2d 419, 423 (1989) (holding a county immune in a personal injury action where the victim alleged the county negligently constructed and maintained a county road).

46. *Peterson v. Great Falls Sch. Dist. No. 1 and A*, 237 Mont. 376, 773 P.2d 316 (1989). The supreme court extended immunity granted by section 2-9-111 to a school district sued for wrongful discharge because one of its administrative assistants fired a custodian. *Id.* at 379, 773 P.2d at 318. The court found immunity for the school district by looking at the "plain meaning of the words used in sec. 2-9-111, MCA." *Id.* at 378, 773 P.2d at 317. According to the court, the statute places school districts under the definition of governmental entities and school boards under the definition of legislative bodies. In addition, the statute grants immunity to an agent acting on behalf of the entity. *Id.* at 378-79, 773 P.2d at 317. See also *Harris v. Bailey*, 244 Mont. 279, 287-88, 798 P.2d 96, 101-02 (1990) (holding a school district immune in a wrongful discharge action where a fired employee alleged the school district breached the covenant of good faith and fair dealing). But see *Koch v. Yellowstone County*, 243 Mont. 447, 454, 795 P.2d 454, 459 (1990) (holding in a wrongful discharge case that a county park board was not immune because the board was neither a legislative body nor an agent of one). See *Mitchell v. University of Montana*, 240 Mont. 261, 264, 783 P.2d 1337, 1339 (1989) (holding in a wrongful discharge suit that the state Board of Regents is not a "local governmental entity given legislative powers by statute" and is, therefore, not immune for legislative acts and omissions).

47. In Justice Sheehy's dissent in *Peterson* he prophesied a new extension of immunity when he wrote: "[t]he decision of the majority in this case has carried immunity of the school district beyond the orbit of legislative action and into the sphere of administrative immunity. That decision is an incorrect reading of the statute." *Peterson*, 237 Mont. at 381, 773 P.2d at 319 (Sheehy, J., dissenting).

48. *State ex rel. Eccleston v. Montana Third Judicial Dist. Court*, 240 Mont. 44, 61, 783 P.2d 363, 374 (1989) (Hunt, J., dissenting). Justice Sheehy also wrote a dissenting opinion. *Id.* at 45, 783 P.2d at 363.

49. *Id.* at 46, 783 P.2d at 364.

50. *Id.* at 46, 783 P.2d at 364-65.

51. *Id.* at 50, 783 P.2d at 367.

trators, and the two custodians were immune from suit.<sup>52</sup> According to the majority, the school district's failure to fund additional maintenance for the stairs was an omission by the district's legislative body, the school board.<sup>53</sup> The court reasoned that as a legislative omission, the failure to act falls under the sovereign immunity statute.<sup>54</sup> Likewise, the supreme court held that the custodians' failure to keep the stairway free of dangerous ice and snow occurred while the custodians lawfully performed the part of their jobs related to the school board's failure to act.<sup>55</sup> Therefore, the court held that custodians also were immune under the statute.<sup>56</sup>

Justice Sheehy, dissenting, strongly criticized the majority's reasoning:

This Court, having in a line of cases needlessly and illogically enlarged governmental immunity for negligence, now marches overzealously to the ultimate nonsense: a janitor in charge of brooming off snow from the steps outside of a school gymnasium is engaged as an agent in legislative action.

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The majority in this case have carried governmental immunity to a far greater reach than was ever extended in the severest of monarchical history. They have not only excused the king; they have excused the king's men, his feudal lords and all their vassals.<sup>57</sup>

The *Eccleston* decision epitomized the supreme court's difficulty in applying sovereign immunity under section 2-9-111. As one critic noted, "[t]he court's willingness to read legislative content into every conceivable government action has brought virtually all official activity in the state of Montana under the umbrella of sovereign immunity."<sup>58</sup>

The pattern of broadly recognizing immunity under section 2-9-111 continued in *Crowell v. School Dist. No. 7*.<sup>59</sup> In *Crowell*, the supreme court held that a school district and physical education

52. *Id.* at 54, 783 P.2d at 369.

53. *Id.* at 52, 783 P.2d at 368.

54. *Id.*

55. *Id.* at 52-53, 783 P.2d at 368.

56. *Id.* at 54, 783 P.2d at 369. See also *Miller v. Fallon County*, 240 Mont. 241, 244, 783 P.2d 419, 421 (1989) (extending immunity for the county and county commissioners to include a district road foreman in a personal injury action claiming a county road was improperly designed, constructed, maintained, and signed).

57. *Eccleston*, 240 Mont. at 54-55, 783 P.2d at 369-70 (Sheehy, J., dissenting).

58. Kutzman, *supra* note 3, at 543.

59. 247 Mont. 38, 805 P.2d 522 (1991).

instructor<sup>60</sup> were immune from a negligence suit brought against them to recover damages for injuries a young woman sustained during a high school gym class.<sup>61</sup>

The supreme court, relying on *Eccleston*, held that the teacher qualified as an agent of the school district.<sup>62</sup> Therefore, under section 2-9-111(2), the school district was immune from suit for the teacher's lawful acts or omissions while working.<sup>63</sup> Likewise, the teacher, as the school district's agent, was immune under section 2-9-111(3) for a tort committed while lawfully performing his job.<sup>64</sup>

The supreme court, despite the case's result on the immunity issue, seemed to recognize in *Crowell* the injustice of leaving injured parties uncompensated. The court, apparently hoping to inject basic fairness into the sovereign immunity doctrine without disrupting precedent, carved out an exception by declaring immunity waived to the extent of the school district's insurance coverage.<sup>65</sup> The court's reasoning for the exception, however, begged the question of sovereign immunity from the outset. The court reasoned that if funds are available from a pre-paid insurance policy, the money should go to the injured party.<sup>66</sup> Correspondingly, if the insurance policy proceeds are not paid to the injured party, the party goes uncompensated, despite the school district's negligence.<sup>67</sup> Furthermore, if the school district is allowed to refuse to pay, it has relinquished its culpability for the incident from which the injuries resulted.<sup>68</sup> Finally, insurance carriers would enjoy a windfall if not required to release insurance policy proceeds after receiving premium payments.<sup>69</sup>

The court in *Crowell* allowed the injured plaintiff to recover for some of her damages. However, the decision did not sweep broadly enough to provide relief in every situation where someone is injured by a governmental entity's negligence. For example, if a school district cannot afford or chooses not to purchase liability

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60. *Id.* at 43, 805 P.2d at 524.

61. *Id.* at 39, 805 P.2d at 522.

62. *Id.* at 42, 805 P.2d at 524.

63. *Id.* at 42-43, 805 P.2d at 524.

64. *Id.* But cf. *Woods v. City of Billings*, 248 Mont. 254, 811 P.2d 534 (1991) (holding that a city administrator, under the city's charter, is in the executive branch of government, not the legislative, and is therefore not immune from liability under § 2-9-111 (1989) for failing to repair a dangerous sidewalk that led to injuries in a slip and fall accident).

65. *Crowell*, 247 Mont. at 58, 805 P.2d at 534.

66. *Id.* at 56, 805 P.2d at 533.

67. *Id.*

68. *Id.* at 56-57, 805 P.2d at 533.

69. *Id.* at 57, 805 P.2d at 533.

insurance coverage,<sup>70</sup> a party injured because of the school district's negligence would go uncompensated. This result is reached because the school district, immune under section 2-9-111, waives immunity only by purchasing insurance. Consequently, the uninsured school district would have no duty or incentive to purchase insurance coverage, beyond a moral obligation, to provide for injuries caused by possible future negligence. The harsh results following the imposition of the sovereign immunity doctrine, therefore, would not disappear simply because of the exception created by the court in *Crowell*.<sup>71</sup>

Again, Justice Sheehy wrote the dissenting opinion. He summarized his on going disagreement with the majority as follows:

The resolute insistence of the majority that sec. 2-9-111, MCA, must be read broadly has denied many a tort-injured person from succor in our courts. The judicial grant of legislative immunity down to the scrub persons mopping up the public halls is an elevation in status not reflected in the scrub persons' pay. Under this holding, the king can do no wrong, and neither can his cooks in the kitchen, nor his ring-masters in the gym, cloaked as they are with legislative immunity.

From the reactions and comments of individual judges and members of the Bar, if I assess them correctly, *Eccleston* and *Peterson*, etc. are examples of judicial interpretations gone off the rails. . . . It is unfortunate that the majority do not use this case to get back on course.<sup>72</sup>

The *S.M.*<sup>73</sup> and *Hedges*<sup>74</sup> decisions extended the line of cases broadening the immunity granted to school districts, school boards, and their agents and employees. But, as Justice Sheehy pointed out in his *Crowell* dissent, the backlash to this overwhelming extension of sovereign immunity was growing.<sup>75</sup>

70. MONT. CODE ANN. § 20-3-331 (1991) provides in pertinent part: "The trustees of a [school] district may purchase insurance coverage or establish a self-insurance plan for the district, trustees, and employees for liability . . . ." (emphasis added).

71. The legislature provided definitive guidance on the question of whether the purchase of insurance should waive immunity. See *infra* notes 83 and 107 and accompanying text. The legislature specified in the 1991 amendments to section 2-9-111 that the purchase of insurance does not waive immunity granted by the statute. MONT. CODE ANN. § 2-9-111(4) (1991).

72. *Crowell*, 247 Mont. at 61, 805 P.2d at 535-36 (Sheehy, J., dissenting) (emphasis added).

73. 248 Mont. 322, 811 P.2d 1295 (1991).

74. 248 Mont. 365, 812 P.2d 334 (1991).

75. *Crowell*, 247 Mont. at 61, 805 P.2d at 536 (Sheehy, J., dissenting).

#### IV. LEGISLATIVE INTERVENTION: MODIFICATION OF AN OUTDATED DOCTRINE

The Montana Supreme Court's decisions rendered before section 2-9-111's amendment in 1991 denied citizens relief for damages caused through the acts or omissions of governmental entities. Seeking to rectify this problem, members of the 1991 Montana Legislature narrowed the instances in which sovereign immunity applies in Montana. Because of the "basic unfairness occurring"<sup>76</sup> with the recent supreme court decisions and the "tremendous awareness in the bar for the need"<sup>77</sup> for change, both houses of the legislature offered bills designed to clarify the statute.

House Bill 691<sup>78</sup> proposed the removal of sovereign immunity for any governmental act or omission causing damage due to contamination of surface or ground water.<sup>79</sup> While House Bill 691's proposed changes to the statute appeared unrelated to the problems developing from the supreme court's interpretation of section 2-9-111, debate among the legislators demonstrated that the issues were inseparable. As State Representative Howard Toole, the bill's sponsor, explained, "most environmental torts are committed against the communities and are legislative in nature, so the bill was integrally related" to the senate bill also seeking amendment of section 2-9-111.<sup>80</sup>

Senate Bill 154<sup>81</sup> proposed clarifying section 2-9-111. The bill sought to clarify that legislative immunity applied to legislative actions of the legislative bodies of governmental entities, and not to administrative actions by those bodies.<sup>82</sup> The bill also provided that the purchase of insurance would not waive immunity.<sup>83</sup> State Senator Dennis Nathe, sponsor of Senate Bill 154, said the 1977 version of section 2-9-111 confused the judiciary as to which governmental entities had legislative immunity.<sup>84</sup> As a result, the supreme court was "fluctuating all over the board on a case-by-case basis" as it tried to define the legislative intent behind section 2-9-

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76. Telephone Interview with Dennis Nathe, Montana State Senator (Senate Dist. 10), sponsor of Senate Bill 154 (Aug. 8, 1992).

77. Telephone Interview with Howard Toole, Montana State Representative (House Dist. 60), sponsor of House Bill 691 (Aug. 7, 1992).

78. 1991 Mont. Laws 818.

79. *Id.* See *supra* note 41 for the statute's text prior to amendment. See also *infra* note 98 for the statute's amended text.

80. See Toole interview, *supra* note 77.

81. 1991 Mont. Laws 821.

82. 1991 Mont. Laws 821.

83. 1991 Mont. Laws 821.

84. See Nathe interview, *supra* note 76.

111.<sup>85</sup> The fluctuations became so pronounced that in *Eccleston*,<sup>86</sup> the court "extended legislative immunity all the way to janitors."<sup>87</sup> Representative Toole added that "the supreme court was embarrassed over the line of cases it had allowed to develop" surrounding legislative immunity.<sup>88</sup>

The need for legislative intervention became apparent to state legislators when citizens, injured through governmental negligence, and Montana attorneys testified before the Montana Senate Judiciary Committee.<sup>89</sup> For example, the woman injured in *Eccleston*,<sup>90</sup> told the legislators that the injuries she sustained significantly changed her life.<sup>91</sup> The court's holding that the school district was immune from suit for its negligence resulted in severe financial hardship for her and her family.<sup>92</sup> Montana attorneys also testified and called upon the legislators to change the language of section 2-9-111.<sup>93</sup> The attorneys maintained that the supreme court's interpretation of section 2-9-111 denied citizens' legal redress.<sup>94</sup> The testimony proved persuasive. By decisive votes,<sup>95</sup> both bills passed the legislature and became law when Governor Stan Stephens signed them on May 24, 1991.<sup>96</sup>

The legislature, by modifying section 2-9-111 slowed the momentum sovereign immunity had gained through the supreme court's recent decisions. In so doing, the legislature revived at least part of the intent behind the 1972 Montana Constitutional Convention's abolition of sovereign immunity.<sup>97</sup> Furthermore, the leg-

85. See Nathe Interview, *supra* note 76.

86. *State ex rel. Eccleston v. Montana Third Judicial Dist. Court*, 240 Mont. 44, 783 P.2d 363 (1989).

87. See Nathe interview, *supra* note 76.

88. See Toole interview, *supra* note 77.

89. *Hearing on Senate Bill 154 Before the Montana Senate Comm. on Judiciary*, 52d Leg. (1991) [hereinafter *Hearings*].

90. 240 Mont. 44, 783 P.2d 363. See also *supra* notes 48-58 and accompanying text.

91. *Hearings*, *supra* note 89, at ex. 3 (prepared testimony of Mary Fitzpatrick).

92. *Hearings*, *supra* note 89, at ex. 3.

93. *Hearings*, *supra* note 89, at 3-4 (testimony of Monte Beck, Carl Hatch, Michael Sherwood, and Ben Everett, and a letter to the committee by J. Michael Young).

94. *Hearings*, *supra* note 89, at 3-4.

95. The Montana Senate approved S.B. 154 as amended by a vote of 48 to 0 on April 29, 1991 (two senators excused). III SENATE JOURNAL, 52d Leg. at 2114 (1991). The Montana House of Representatives approved S.B. 154 as amended by a vote of 95 to 3 on April 23, 1991 (two representatives excused). IV HOUSE JOURNAL, 52d Leg. at 2925-26 (1991). The Montana Senate approved H.B. 691 as amended by a vote of 44 to 3 on April 29, 1991 (one senator absent and two senators excused). III SENATE JOURNAL, 52d Leg. at 2067 (1991). The Montana House of Representatives approved H.B. 691 as amended by a vote of 74 to 24 on April 25, 1991 (two representatives absent). IV HOUSE JOURNAL, 52d Leg. at 3081 (1991).

96. 1991 Mont. Laws 818, 821.

97. Kutzman, *supra* note 3, at 534.

islature's response to the public's distaste for the sovereign immunity doctrine helped put an errant supreme court back on track. The following section explores the changes made to section 2-9-111.

## V. CLARIFICATION OF THE SOVEREIGN IMMUNITY STATUTE

The amendments to section 2-9-111<sup>98</sup> profoundly alter the statute in four ways.<sup>99</sup> First, the amendments clarify that "legislative immunity extends only to legislative bodies of governmental

98. The changes to section 2-9-111 follow. Brackets indicate deletions and italics indicate additions pursuant to S.B. 154 and H.B. 691. The changes indicated are from the text of both bills. 1991 Mont. Laws 818, 821.

(1) As used in this section:

(a) the term "governmental entity" [includes] *means only the state, counties, municipalities, [and] school districts, and any other local government entity or local political subdivision vested with legislative power by statute;*

(b) the term "legislative body" [includes] *means only the legislature vested with legislative power by Article V of The Constitution of the State of Montana and [any local governmental entity given legislative powers by statute, including school boards.] that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves;*

(c) (i) the term "legislative act" means:

(A) *actions by a legislative body that result in creation of law or declaration of public policy;*

(B) *other actions of the legislature authorized by Article V of The Constitution of the State of Montana; or*

(C) *actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1);*

(ii) *the term legislative act does not include administrative actions undertaken in the execution of a law or public policy.*

(2) A governmental entity is immune from suit for [an] *a legislative act or omission [of] by its legislative body, or [a] any member [, officer, or agent thereof] or staff of the legislative body, engaged in legislative acts.*

(3) [A] *Any member [, officer,] or [agent] staff of a legislative body is immune from suit for damages arising from the lawful discharge of an official duty associated with [the introduction or consideration of legislation or action by] legislative acts of the legislative body.*

(4) *The acquisition of insurance coverage, including self-insurance or group self-insurance, by a governmental entity does not waive the immunity provided by this section.*

[(4)](5) The immunity provided for in this section does not extend to:

(a) *any tort committed by the use of a motor vehicle, aircraft, or other means of transportation; or*

(b) *any act or omission that results in or contributes to personal injury or property damage caused by contamination or other alteration of the physical, chemical, or biological properties of surface water or ground water, for which a cause of action exists in statutory or common law or at equity. This subsection (b) does not create a separate or new cause of action.*

MONT. CODE ANN. § 2-9-111 (1991).

99. 1991 Mont. Laws 818, 821 (providing the text of the bills' titles, additions, and deletions).

entities and only to legislative actions taken by those bodies . . . .”<sup>100</sup> Section 2-9-111(1)(a) reflects this change by providing that the term “governmental entity” now “*means only* the state, counties, municipalities, school districts, and any other local government entity or local political subdivision vested with legislative power by statute.”<sup>101</sup> Additionally, section 2-9-111(1)(b) clarifies the term “legislative body” by providing that the term now “*means only* the legislature . . . and that branch or portion of any other local governmental entity or local political subdivision empowered by law to consider and enact statutes, charters, ordinances, orders, rules, policies, resolutions, or resolves . . . .”<sup>102</sup> These changes limit the types of governmental entities and bodies eligible for legislative immunity.

Second, the amendments deny immunity to governmental entities for non-legislative acts. Section 2-9-111(1)(c)(i) specifically defines legislative acts as “actions by a legislative body that result in creation of law or declaration of public policy; . . . other actions of the legislature . . . or actions by a school board that result in adoption of school board policies pursuant to 20-3-323(1) . . . .”<sup>103</sup> Even more important, however, section 2-9-111(1)(c)(ii) states specifically that “the term legislative act *does not include administrative actions* undertaken in the execution of a law or public policy . . . .”<sup>104</sup> Furthermore, sections 2-9-111(2) and (3) grant immunity to governmental entities and “any member or staff” of legislative bodies for “legislative” acts or omissions by the legislative bodies.<sup>105</sup> These provisions clarify the legislature’s intent to limit immunity to those acts dealing with the “creation of law or declaration of public policy”<sup>106</sup> and to deny immunity for administrative acts.

Third, section 2-9-111(4) states that “acquisition of insurance coverage, including self-insurance or group self-insurance, by a governmental entity *does not waive* the immunity provided by [2-9-111].”<sup>107</sup> This provision eliminates any doubt about the effect of a governmental entity’s purchase of insurance upon its eligibility for legislative immunity under section 2-9-111.

Finally, section 2-9-111(5)(b) clarifies that immunity does not

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100. 1991 Mont. Laws 821 (quoting Senate Bill 154’s title).

101. MONT. CODE ANN. § 2-9-111(1)(a) (1991) (emphasis added).

102. MONT. CODE ANN. § 2-9-111(1)(b) (1991) (emphasis added).

103. MONT. CODE ANN. § 2-9-111(1)(c)(i) (1991).

104. MONT. CODE ANN. § 2-9-111(1)(c)(ii) (1991) (emphasis added).

105. MONT. CODE ANN. § 2-9-111(2), (3) (1991).

106. MONT. CODE ANN. § 2-9-111(1)(c)(i)(A) (1991).

107. MONT. CODE ANN. § 2-9-111(4) (1991) (emphasis added).



extend to acts or omissions that result in or contribute to "personal injury or property damage caused by contamination . . . of the physical, chemical, or biological properties of surface water or ground water . . . ." <sup>108</sup>

The legislature's amendments to section 2-9-111 effectively define those governmental entities, legislative bodies and legislative acts eligible for immunity. By eliminating the statute's ambiguous language and replacing it with more precise terms, the legislature allowed the supreme court to revisit the sovereign immunity issue with a greater understanding of the statute's purpose. As the following discussion indicates, the supreme court's recent decisions have correctly interpreted the amended statute.

## VI. POST-AMENDMENT SUPREME COURT DECISIONS

Shortly after section 2-9-111 was amended, governmental immunity cases again appeared before the supreme court. In *Sanders v. Scratch Gravel Landfill District*,<sup>109</sup> homeowners sued a landfill district seeking damages for loss of value to their property due to a contaminated water supply.<sup>110</sup> The district court granted the landfill district's motion to dismiss the suit by determining that the landfill district was immune under section 2-9-111.<sup>111</sup> In light of the amendments to the statute, however, the supreme court remanded the case to the district court<sup>112</sup> because of section 2-9-111's new subsection concerning water contamination.<sup>113</sup> The supreme court in *Sanders* provided little guidance for predicting what course the sovereign immunity issue in Montana might take following the amendments to section 2-9-111. Later cases, however, proved more instructive.

In *Dagel v. City of Great Falls*,<sup>114</sup> a Great Falls city employee sued the city, alleging that her supervisor harassed her into resigning from her job by repeatedly disciplining her for poor performance.<sup>115</sup> The district court relied on two cases decided prior to section 2-9-111's amendment in 1991 and held the city immune.<sup>116</sup>

108. MONT. CODE ANN. § 2-9-111(5)(b) (1991).

109. 249 Mont. 232, 814 P.2d 1005 (1991).

110. *Id.* at 233, 814 P.2d at 1005.

111. *Id.*

112. *Id.* at 236, 814 P.2d at 1007.

113. MONT. CODE ANN. § 2-9-111(5)(b) (1991).

114. 250 Mont. 224, 819 P.2d 186 (1991).

115. *Id.* at 226, 819 P.2d at 187.

116. *Id.* at 231, 819 P.2d at 190 (citing *Peterson v. Great Falls School Dist. No. 1 and A*, 237 Mont. 376, 773 P.2d 316 (1989) and *State ex rel. Eccleston v. Montana Third Judicial Dist. Court*, 240 Mont. 44, 783 P.2d 363 (1989)).

Without actually overruling previous sovereign immunity cases, the supreme court recognized that the critical alterations made in the statute would shift Montana's course on the sovereign immunity issue.<sup>117</sup>

In *Dagel*, the supreme court held that the new statute provides that a legislative body does not enjoy immunity for the negligent acts of its employees.<sup>118</sup> The court further held that the purchase of insurance does not waive immunity provided under the statute.<sup>119</sup> Consequently, the court determined that the key question in *Dagel* was whether harassment by a supervisor is considered a "legislative act" within the meaning of the statute.<sup>120</sup> The supreme court, in the first critical departure from recent precedent, held that the harassment was not a legislative act within the meaning of section 2-9-111 and, therefore, the city was not immune under the statute.<sup>121</sup> The court, recognizing that not all acts by governmental entities are legislative acts protected by the sovereign immunity statute, effectively gave those injured by the government's negligent acts new hope for redress in Montana courts.

The supreme court followed the *Dagel* decision six months later in *Knight v. City of Missoula*<sup>122</sup> and stated unequivocally that "a governmental entity is no longer immune for *all* of its actions."<sup>123</sup> In *Knight*, city residents sought closure of a dirt road, claiming its establishment and use caused dangerous pollution and disruption problems in their neighborhood.<sup>124</sup> The residents further claimed that these problems caused them to suffer damages for which they ought to receive compensation.<sup>125</sup> The district court concluded, that section 2-9-111 granted immunity to the city in the action.<sup>126</sup>

The supreme court held that the Missoula City Council is a governmental entity under section 2-9-111.<sup>127</sup> The court further held that a city's duty to maintain its streets is an administrative function.<sup>128</sup> The court noted that section 2-9-111, as amended in 1991, does not provide immunity to governmental entities for ad-

117. *Id.* at 233, 819 P.2d at 191.

118. *Id.* (citing MONT. CODE ANN. § 2-9-111(1)(c) (1991)).

119. *Id.* (citing MONT. CODE ANN. § 2-9-111(4) (1991)).

120. *Id.*

121. *Id.* at 233, 819 P.2d at 191-92.

122. 252 Mont. 232, 827 P.2d 1270 (1992).

123. *Id.* at 245, 827 P.2d at 1278.

124. *Id.* at 237, 827 P.2d at 1273.

125. *Id.* at 238, 827 P.2d at 1273.

126. *Id.* at 244, 827 P.2d at 1277.

127. *Id.* at 245, 827 P.2d at 1278 (citing MONT. CODE ANN. § 2-9-111(1)(a) (1991)).

128. *Id.* at 246, 827 P.2d at 1278 (citations omitted).

ministrative acts.<sup>129</sup> Consequently, section 2-9-111 provided no immunity to the City of Missoula for its administrative act of maintaining the road.<sup>130</sup>

In *Knight*, the supreme court identified the Missoula City Council as a legislative entity. Furthermore, the supreme court did not commit the same analytical error made in pre-amendment cases of holding all acts by legislative entities automatically "legislative" in nature.<sup>131</sup> The court pursued the next step in analyzing sovereign immunity issues and looked to the nature of the act or function being performed by the governmental entity. The court, finding the act of street maintenance an "administrative" function,<sup>132</sup> concluded that the city could not use sovereign immunity as a defense because section 2-9-111(c)(ii) states that administrative acts are not immune.<sup>133</sup>

The supreme court, in *Quirin v. Weinberg*,<sup>134</sup> again followed *Dagel*. In *Quirin*, a property purchaser sued Yellowstone County and the State of Montana<sup>135</sup> for negligently misrepresenting that a house was an improvement on property he bought, when the house was not actually on the purchased property.<sup>136</sup> The purchaser, relying on the county's assurances that the house was on the property, began remodeling the house.<sup>137</sup> The purchaser also sued the state, claiming that the property assessor, an agent of the State Department of Revenue, negligently misrepresented that the house was an improvement upon the purchased property.<sup>138</sup> The district court granted summary judgment in favor of Yellowstone County and the State of Montana, apparently based on immunity provided under the pre-amendment version of section 2-9-111.<sup>139</sup>

The supreme court, applying the amended version of section 2-9-111, held that legislative bodies cannot claim immunity from suit for their employees' negligent acts.<sup>140</sup> Therefore, the court con-

129. *Id.* at 245, 827 P.2d at 1278 (citing MONT. CODE ANN. § 2-9-111(1)(c)(ii) (1991)).

130. *Id.* at 247, 827 P.2d at 1279.

131. See Kutzman, *supra* note 3, at 539. Kutzman posited that the supreme court's faulty analysis in deciding cases prior to section 2-9-111's amendment stemmed from the court's failure to look to the nature of the acts rather than to "the identity of the actor" in determining whether to grant immunity. *Id.*

132. *Knight*, 252 Mont. at 246, 827 P.2d at 1278.

133. MONT. CODE ANN. § 2-9-111(c)(ii) (1991).

134. 252 Mont. 386, 830 P.2d 537 (1992).

135. *Id.* at 389, 830 P.2d at 539.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 388, 830 P.2d at 538.

140. *Id.* at 390, 830 P.2d at 539 (citing *Dagel*, 250 Mont. at 233, 819 P.2d at 191-92).

cluded that the state and county could not use sovereign immunity as a defense to the property purchaser's action.<sup>141</sup> The supreme court in *Quirin* applied the reasoning from *Dagel* with reference to the amended section 2-9-111. The court's holding was consistent with the legislative intent underlying section 2-9-111, limiting grants of immunity only to those engaged in legislative acts. As the court concluded, the employees' negligent acts in *Quirin* did not qualify the county or state for immunity under the statute.

The supreme court continued reshaping the sovereign immunity doctrine in Montana in *Hedges v. Swan Lake & Salmon Prairie Sch. Dist. (Hedges II)*.<sup>142</sup> In the first *Hedges* case (*Hedges I*)<sup>143</sup> the district court granted the defendants summary judgment, holding the school district and teacher immune under the pre-amendment version of section 2-9-111.<sup>144</sup> The district court further held that the school district's purchase of liability insurance did not waive its immunity.<sup>145</sup> The supreme court affirmed the immunity holding, but held that the school district did waive its immunity to the extent of coverage of school insurance policies.<sup>146</sup>

In *Hedges II* the district court concluded that the school district and teachers still fell under the immunity granted by section 2-9-111, despite the amendments made to the statute.<sup>147</sup> This time, the supreme court reversed the district court's decision and held that neither the school district nor the teacher could claim immunity under section 2-9-111.<sup>148</sup>

The supreme court again recognized the significance of the amendments to section 2-9-111. After concluding that the school district and school board fell under section 2-9-111's definitions of "governmental entity"<sup>149</sup> and "legislative body,"<sup>150</sup> respectively,<sup>151</sup> the court analyzed the facts. The court's analysis focused on the nature of the act of the school district employee of negligently throwing a shot put.<sup>152</sup> In determining that the act was not legislative in nature, the court concluded the school district was not im-

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141. *Id.*

142. 253 Mont. 188, 832 P.2d 775 (1992).

143. 248 Mont. 365, 812 P.2d 334 (1991). See also *supra* notes 8-11 and 74 and accompanying text.

144. *Hedges I*, 248 Mont. 365, 812 P.2d 334.

145. *Id.* at 366, 812 P.2d at 334.

146. *Id.* at 368, 812 P.2d at 336.

147. *Hedges II*, 253 Mont. at 191, 832 P.2d at 776-77.

148. *Id.* at 194-95, 832 P.2d at 778.

149. MONT. CODE ANN. § 2-9-111(1)(a) (1991).

150. MONT. CODE ANN. § 2-9-111(1)(b) (1991).

151. *Hedges II*, 253 Mont. at 194, 832 P.2d at 778.

152. *Id.* at 194-95, 832 P.2d at 778.

mune under section 2-9-111.<sup>153</sup>

In the most recent case dealing with sovereign immunity in Montana, the supreme court again construed the amended section 2-9-111 as limiting governmental immunity. In *Koch v. Billings School District No. 2*,<sup>154</sup> a junior high school student sustained serious injuries while attempting to perform a weight-lifting technique at his physical education teacher's request.<sup>155</sup> The student sued the school district, the physical education teacher, and the Billings School District Board of Trustees.<sup>156</sup> Relying on *Eccleston*,<sup>157</sup> the district court granted summary judgment to the teacher and the Board of Trustees and later granted summary judgment to the school district.<sup>158</sup> The plaintiff did not appeal from either summary judgment, apparently because of the state of the law at the time. After the supreme court's holding in *Crowell*,<sup>159</sup> however, the plaintiff moved for relief from judgment, which the district court denied.<sup>160</sup> The plaintiff then appealed to the Montana Supreme Court, which granted the request.<sup>161</sup>

The supreme court held that the amended version of section 2-9-111 applied to *Koch* because of the statute's retroactive applicability to cases not final by the May 24, 1991, effective date.<sup>162</sup> The court applied the reasoning from *Dagel* and held that section 2-9-111 did not grant the School District immunity for the teacher's negligent acts.<sup>163</sup> The supreme court further concluded that "the teacher's acts of instructing [the student] to squat-press 360 pounds of weight are not legislative acts."<sup>164</sup> The teacher, therefore, was not entitled to immunity under section 2-9-111's immunity provision.<sup>165</sup> The court in *Koch* explained that section 2-9-111(4) specifically overrules the portion of *Crowell* which held that the purchase of liability insurance waived immunity granted by section 2-9-111 to the extent of the policies' coverage.<sup>166</sup> Finally, the supreme court remanded the case to the district court, in-

153. *Id.* at 195, 832 P.2d at 778.

154. 253 Mont. 261, 833 P.2d 181 (1992).

155. *Id.* at 263, 833 P.2d at 182-83.

156. *Id.* at 263-64, 833 P.2d at 183.

157. *Eccleston*, 240 Mont. 44, 783 P.2d 363.

158. *Hedges II*, 253 Mont. at 263, 833 P.2d at 182.

159. 247 Mont. 38, 805 P.2d 522 (1991).

160. *Koch*, 253 Mont. at 263, 833 P.2d at 183.

161. *Id.* at 268-69, 833 P.2d at 186.

162. *Id.* at 270, 833 P.2d at 187.

163. *Id.* at 271, 833 P.2d at 187.

164. *Id.*

165. *Id.*

166. *Id.*

structing the lower court to follow the new guidelines from section 2-9-111 and the holding from *Dagel*.<sup>167</sup>

The post-amendment cases from *Dagel* through *Koch* demonstrate the Montana Supreme Court's commitment to strictly construe section 2-9-111. While sovereign immunity remains intact for purely legislative acts, administrative acts no longer fall within the parameters of immunity under Montana's legislative immunity statute. Likewise, governmental entities should no longer escape liability for their employees' negligent acts or omissions, regardless of whether the employees were lawfully at work at the time. Finally, legislative entities entitled to sovereign immunity under section 2-9-111 do not waive immunity by purchasing insurance.

## VII. CONCLUSION

The cases decided in the wake of section 2-9-111's amendment indicate the Montana Supreme Court's retreat from liberally granting immunity to legislative entities and their subordinates at the lowest levels. The post-amendment decisions reflect the profound changes made to the sovereign immunity statute. The changes provide relief for plaintiffs injured at the government's hands. Simultaneously, the changes limit legislative immunity to governmental entities engaged in legislative acts. The supreme court should, and from all indications will, continue proceeding on course to ensure that the legislature's intent of limited legislative immunity is met.

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167. *Id.* at 272, 833 P.2d at 188.

